

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE DISTRICT OF DELAWARE

IN RE: Chapter 11
ETOYS, INC., et al., : Case Nos. 01-0706 (MFW)
Confirmed Debtors. : through 01-0709 (MFW)

ROBERT K. ALBER, Pro Se, : CIVIL ACTION
Appellant, :
v :
TRAUB BONAQUIST & FOX, LLP, :
BARRY GOLD, MORRIS NICHOLS :
ARSHT & TUNNELL, LLP, and :
POST-EFFECTIVE DATE COMMITTEE :
OF EBC I, INC., : NOS. 05-830 (KAJ)
and 05-831 (KAJ)
Appellee.

Wilmington, Delaware
Monday, October 16, 2006 at 3:28 p.m.
TELEPHONE CONFERENCE

BEFORE: HONORABLE **KENT A. JORDAN**, U.S.D.C.J.

APPEARANCES:

ROBERT K. ALBER
Pro Se Plaintiff

Brian P. Gaffigan
Official Court Reporter

1 APPEARANCES: (Continued)

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DUANE MORRIS, LLP
BY: FREDERICK B. ROSNER, ESQ.

4

and

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KRONISH LIEB WEINER & HELLMAN, LLP
BY: RONALD R. SUSSMAN, ESQ.
(New York, New York)

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Counsel for Traub Bonaquist & Fox, LLP

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OFFICE OF THE U.S. TRUSTEE
BY: MARK S. KENNEY, ESQ.

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Counsel for the U.S. Trustee

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MORRIS NICHOLS ARSHT & TUNNELL, LLP
ATTN: GREGORY W. WERKHEISER, ESQ.

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Counsel for Morris Nichols
Arsht & Tunnell, LLP

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SAUL EWING, LLP
BY: MARK MINUTI, ESQ.

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Counsel for Barry Gold

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P R O C E E D I N G S

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(REPORTER'S NOTE: The following telephone

23

conference was held in chambers, beginning at 3:28 p.m.)

24

THE COURT: Hi, this is Judge Jordan. Who do I

25

have on the line?

1 MR. WERKHEISER: Good afternoon, Your Honor.
2 This is Gregory Werkheiser on behalf of Morris Nichols Arhst
3 & Tunnell, LLP.

4 THE COURT: Okay. Who else? Anybody else on
5 the line?

6 MR. WERKHEISER: Yes, Your Honor. I guess I'll
7 go ahead. I took a roll call before we called into the
8 Court and I can announce everybody else, if you would like.

9 THE COURT: No, I would rather have them
10 announce themselves.

11 MR. WERKHEISER: Certainly, Your Honor.

12 THE COURT: So who else is on, please? Don't be
13 shy.

14 Mr. Werkheiser, is there nobody else on this
15 call?

16 MR. WERKHEISER: Well, I thought I had
17 everybody. I apologize. I thought I had everybody when I
18 called into the Court and we seem to have lost them.

19 THE COURT: Mr. Alber, are you there?

20 Okay. I'm going to hang-up. You see what you
21 can do; all right, Mr. Werkheiser?

22 MR. WERKHEISER: I'll ring you back momentarily.

23 (Brief recess taken.)

24 THE COURT: Okay. This is Judge Jordan. Who do
25 I have on the line?

1 MR. WERKHEISER: Your Honor, this is Gregory
2 Werkheiser again from Morris Nichols. I believe we have all
3 the other parties as well this time.

4 THE COURT: Okay. Who else do I have on the
5 line?

6 MR. ALBERS: Robert Albers.

7 THE COURT: Okay.

8 MR. MINUTI: Your Honor, this is Mark Minuti
9 from Saul Ewing. I represent Barry Gold.

10 MR. KENNEY: Good afternoon, Your Honor. Mark
11 Kenney for the United States Trustee.

12 MR. SUSSMAN: Good afternoon, Your Honor.
13 Ronald Sussman, Kronish Lieb Weiner & Hellman for the Traub
14 Bonaquist firm.

15 MR. ROSNER: Your Honor, good afternoon. Fred
16 Rosner with the Duane Morris firm in Wilmington, local
17 counsel for Traub Bonaquist & Fox.

18 THE COURT: All right. Anybody else?

19 All right. Well, I've been trying to get this
20 case on track for resolution and have not been having a
21 great deal of success. Today, this afternoon actually about
22 an hour ago, a little over an hour ago, I received a 22 page
23 motion with numerous attachments from Mr. Alber seeking an
24 enlargement of time to prepare and file his opening brief.

25 Has anybody else on this call besides Mr. Alber

1 and me seen this document?

2 MR. KENNEY: Your Honor, it's Mark Kenney for
3 the United States Trustee. I have seen it.

4 MR. SUSSMAN: Ron Sussman. We've seen it, Your
5 Honor.

6 MR. WERKHEISER: Your Honor, Greg Werkheiser. I
7 have seen it also.

8 MR. MINUTI: Mark Minuti. I have also seen the
9 document, Your Honor.

10 THE COURT: All right. Well, then we're ready
11 to talk about this for a minute.

12 Mr. Alber.

13 MR. ALBER: Yes, sir.

14 THE COURT: I've got a couple questions for you.
15 First, you say you've been unable to prepare an opening
16 brief to articulate your position on why this appeal --
17 well, your positions on appeal but you've put together, as
18 I say, a 22 page motion with numerous attachments and a
19 comprehensive time line and your position on why you should
20 have more time. Help me understand why if you can generate
21 a document like this, you are incapable of generating a
22 brief that would articulate your position on appeal.

23 MR. ALBER: Well, as I tried to explain there
24 toward the end, I tried putting together the brief and it
25 actually took me over a week to put that together but when

1 it comes to codes and statutes and everything that I knew I
2 previously filed, I'm just overwhelmed with the stress and
3 anxiety and I'm having a really difficult time. I had a
4 really difficult time putting that together and the only
5 reason I was able to put that together so well is because
6 I've been living through that case for the last -- well,
7 through both these cases for the last five years.

8 THE COURT: Yes. And I do want to put on this
9 record the basis for your motion, in addition to, of course,
10 your own assertions about your mental condition is a letter
11 dated October 6th, 2006 from a nurse practitioner at the
12 Sunrise Wellness Clinic in Stockton Hill Road, Kingman,
13 Arizona which reads in its entirety, meaning the body of
14 the letter, not citations and other things: "Mr. Alber was
15 seen in my office today and requested I write this letter
16 to the Court for him. He is experiencing extreme stress
17 and anxiety. He states he has been working on some legal
18 proceedings which have been occupying all of his time and
19 energy. This is causing insomnia and anxiety. If it is
20 possible, could these legal matters be put on hold for a
21 time allowing Mr. Alber for a respite?"

22 Now, Mr. Alber, this appears to be a statement
23 by this nurse practitioner that your subjective complaints
24 are such that she would pose the question, could this be put
25 on hold for a time? Do you have anything else to offer me

1 besides this as a basis for saying that you have a medical
2 proof that you are unable to proceed?

3 MR. ALBER: No, I don't, Your Honor. She is
4 my regular, what I would consider my doctor. I am not
5 oftentimes ill and I go to her because of, you know, I have
6 Medicare.

7 THE COURT: All right. Let me ask for positions
8 from the other parties here because, of course, what you
9 have asked in your submission which hit the rest of us today
10 casts the circumstances in a somewhat different light. We
11 were getting on the phone today to find out how to proceed
12 in light of your failure to respond. Now I guess we're
13 going to be looking at that question in light of this
14 motion.

15 Mr. Werkheiser.

16 MR. WERKHEISER: Your Honor, we haven't had an
17 opportunity to fully digest Mr. Alber's document but I think
18 we would oppose Mr. Alber's request. I really didn't see
19 anything that would rise to the level of cause or excusable
20 neglect to extend a briefing deadline that was actively
21 discussed among the parties and affirmatively agreed to
22 before it was fixed.

23 THE COURT: Mr. Minuti.

24 MR. MINUTI: Your Honor, Mark Minuti. I'll
25 make this short and sweet. We agree with Mr. Werkheiser.

1 We don't believe Mr. Alber has shown cause. I'll just leave
2 it at that.

3 THE COURT: Mr. Kenney?

4 MR. KENNEY: Your Honor, I don't believe there
5 is cause. Reading Mr. Alber's document, he is under stress
6 from litigation which is endemic to engaging in litigation.

7 THE COURT: Anybody on behalf of Traub Bonaquist
8 & Fox?

9 MR. SUSSMAN: This is Mr. Sussman. We oppose
10 the application, Your Honor.

11 THE COURT: Reason?

12 MR. SUSSMAN: Because we think he has failed to
13 show cause.

14 THE COURT: All right. Mr. Alber, I'll give you
15 a chance to their contentions that you haven't shown any
16 cause in this matter for an extension or sufficient cause
17 for an extension.

18 MR. ALBER: Okay, Your Honor. Thank you. Well,
19 for one thing, I am completely unfamiliar with what I would
20 need to show cause. The best I could think of to do was to
21 go to my regular doctor and try to explain the best I could
22 what I've been having to go through for several years now.

23 THE COURT: And what would you propose besides
24 an open-ended extension? Because your motion seems to say,
25 and I'm not quoting it now but telling you what I understand

1 it to be seeking by way of relief that this case stop until
2 you feel better.

3 MR. ALBER: Well, thank you, Your Honor. I'm
4 not expecting -- excuse me. I'm not in particular asking
5 for an open-ended date.

6 THE COURT: Did you suggest a date?

7 MR. ALBER: The nurse practitioner suggested at
8 least 30 days and more to me. She told me if I continue
9 along the pace I was going, I was possibly facing a complete
10 nervous breakdown. So if we could put it at least 30 days
11 in the future, I could do that. I'll have to take at least
12 a couple weeks off because it's going to take me at least a
13 couple weeks to put together this brief if I'm feeling
14 better. Me being a pro se, I'm not asking for any special
15 consideration here, but it takes me a lot longer to put
16 together something like this than an experienced attorney.

17 THE COURT: Yes, I'm not faulting your ability
18 to put together a position at all, Mr. Alber. On the
19 contrary, Mr. Alber, I wonder why you couldn't put together
20 a brief in support of your appeal when you put together a
21 very fine document in articulating your position for an
22 extension clearly. So it's not the ability you have, it's
23 the failure to exercise your ability in this instance to
24 produce an opening brief that has me asking these questions.

25 Well, here is what we're going to do. I'm going

1 to give you your 30 days Mr. Alber. I'll give you 30 days
2 to come up with this opening brief, okay? Is that what I
3 understood you to be asking for?

4 MR. ALBER: That would probably be fine, Your
5 Honor. Yes.

6 THE COURT: Okay. If I understood you right,
7 I'll give you that. Now, if you can't do it within the
8 30 days because you feel like you are still mentally and
9 emotionally at sea, then I will entertain a motion. You go
10 ahead and tell me, file a document which you have to serve
11 on everybody, since that you didn't apparently do with the
12 current motion, because I don't think they saw it until we
13 posted it and they got their filing notice that way. I
14 might be wrong about that but that's what I understand from
15 my staff you are obligated to file when you file to serve
16 all the parties.

17 MR. ALBER: If I may interrupt for a second,
18 Your Honor. We did send it out to all the parties. I'm not
19 quite sure how they got it but we did.

20 THE COURT: Okay.

21 MR. WERKHEISER: We got it today.

22 MR. MINUTI: Your Honor, I think we received it.

23 MR. KENNEY: I had an e-mail this morning. Mark
24 Kenney.

25 THE COURT: All right. Thanks.

1 MR. ALBER: And we're in the process of mailing
2 them out, too.

3 THE COURT: Okay. Thank you. I stand
4 corrected. You need to send me a letter if you feel like
5 you can't meet that 30-day deadline that we're giving you,
6 and then you would need to also -- well, in effect, you
7 would, not a letter, send me a motion for further extension
8 of time. And you would need to, of course, append your
9 further documentation from your medical provider. And what
10 I will do at that point is I will entertain a motion from
11 any of the defendants under Rule 35(a) of the Federal Rules
12 of Criminal Procedure which provides that if a party's
13 mental or physical condition is at issue and good cause is
14 shown for requiring an independent examination, and in this
15 instance I would certainly consider it good cause shown, to
16 keep putting off briefing on appeal, we'll go ahead and
17 require you to submit to an independent examination by a
18 psychiatrist or a duly certified psychologist that all the
19 parties can agree on and you will bear at least half the
20 cost of that, maybe all the cost of that, depending on how
21 it comes out and we'll see whether, from an independent
22 practitioner, mental health practitioner's perspective you
23 are genuinely unable to proceed. Because I don't want to
24 deprive you of your opportunity to make your case but I also
25 don't want to make people whose rights are at stake here on

1 the defendants' side wait indefinitely on the basis of
2 subjective complaints which are supported by no more than
3 the very sketchy statement, indeed question posed by your
4 nurse practitioner. Do you understand what I'm saying,
5 Mr. Alber?

6 MR. ALBER: Yes, I do, Your Honor. If I might
7 ask either the Court or if any other counsel would just
8 comment, is my nurse practitioner that I regularly go to, is
9 that allowed in federal court or is it only a doctor that is
10 recognized?

11 THE COURT: Well, I'm not sure. If what
12 you're -- are you asking is it good enough to have a nurse
13 practitioner, as opposed to a medical doctor, saying you're
14 unfit? I don't think we need to go there because I'm
15 telling you it doesn't turn on whether she is a nurse
16 practitioner or MD, it turns on her being your doctor who
17 has given no more to me than a very short one paragraph
18 statement that says Mr. Alber tells me he has got insomnia
19 and anxiety, couldn't you put this off, basically.

20 MR. ALBER: Okay.

21 THE COURT: So what I'm telling you is that's
22 not much but it's enough to get you 30 days. And if you
23 still can't do it in that time frame, then we're going to
24 get you to a doctor that isn't your doctor, it's some
25 independent party with credentials associated with mental

1 health evaluation and we'll see how you are.

2 MR. ALBER: Okay. If I may, Your Honor, the
3 only consideration I would ask for in that respect is if I'm
4 going to have to burden me the cost, if the parties could do
5 their best to make sure they accept Medicare.

6 THE COURT: Well, you can absolutely work with
7 the defendants to try to find somebody appropriate. You
8 need to understand we're not, I'm not trying to make this
9 hard on you from a financial perspective. On the contrary,
10 I'm trying to respect your needs but yours are not the only
11 needs I'm bound to respect. I have to recognize that there
12 are other parties in this case. They want this thing
13 resolved. I'm sure you want it resolved. But they have as
14 much right to have it resolved as you do and so I'm going to
15 be paying attention to their needs as well as yours; all
16 right?

17 MR. ALBER: I understand, Your Honor. That is
18 entirely fair.

19 THE COURT: Okay. Well, does anybody have any
20 questions about what I have said? I answered a few for
21 Mr. Alber. Any more from you, sir?

22 MR. MINUTI: Your Honor, it's Mark Minuti.

23 THE COURT: Just a moment. Let me see if there
24 is anything else from Mr. Alber?

25 MR. ALBER: No, I'm through, Your Honor.

1 THE COURT: Mr. Werkheiser, any question from
2 you?

3 MR. WERKHEISER: No, Your Honor. Thank you.

4 THE COURT: Mr. Minuti.

5 MR. MINUTI: Yes, Your Honor. Just so everybody
6 is clear on the phone, is the 30 days running from today as
7 opposed to the 4th which was the day his brief was due?

8 THE COURT: It's running from today.

9 MR. MINUTI: And, Your Honor, there is an order
10 already entered in the case with a specific deadline for the
11 appellees brief. Do you want to set a reply deadline now?

12 THE COURT: Well, we'll have that answering
13 brief due on the same time schedule, that is, the same gap
14 being between the two. Now, I'm not sure but it's probably
15 two weeks to a month in between.

16 MR. KENNEY: Mark Kenney. I believe it was
17 15 days, Your Honor.

18 THE COURT: 15 days? All right. We'll
19 calculate it out 15 days. And then we'll have the reply due
20 again on the same time frame, which is probably six or seven
21 days. What is it?

22 MR. WERKHEISER: I believe it was seven days,
23 Your Honor.

24 THE COURT: Seven days. All right.

25 MR. WERKHEISER: Your Honor, this is Gregory

1 Werkheiser. There was a reply contemplated on the prior
2 scheduling order for Morris Nichols' cross appeal, if
3 necessary.

4 THE COURT: Well, you folks figure it out on the
5 same basis; all right?

6 MR. WERKHEISER: Yes. Certainly, Your Honor.

7 THE COURT: In other words, we're shoving
8 everything back 30 days from today. in recognition of what
9 Mr. Alber contends is a medical need. And that's how we'll
10 proceed. And indeed, I'll ask you folks at Morris Nichols
11 if you wouldn't mind to take the lead in drafting up a short
12 scheduling order, form of order which gives content to the
13 remarks I have made here. That is saying opening brief from
14 Mr. Alber due 30 days from today, whatever that date is, et
15 cetera, et cetera; all right?

16 MR. WERKHEISER: Yes, Your Honor. Should
17 that incorporate your original ruling with respect to
18 consideration of a further extension request as well?

19 THE COURT: No, I think the transcript is
20 sufficient for that because we may not need to go there
21 ultimately. And if we do, there is time enough to
22 incorporate it in a further written order, but I believe
23 everybody understands what I have explained on this call
24 and then that should suffice for the time being.

25 MR. SUSSMAN: Your Honor, this is Ron Sussman.

1 If you will indulge me with one separate but related item I
2 would like to ask the Court about.

3 THE COURT: All right.

4 MR. SUSSMAN: There is a designation of the
5 record that Mr. Alber has made that the defendants uniformly
6 think is an improper designation and we were wondering if we
7 could get some guidance from the Court as to how you would
8 like to handle that.

9 THE COURT: I think you should handle it the
10 way you did the last time. My understanding is you made a
11 motion to strike and if you can talk with Mr. Alber, if he
12 feels well enough to talk with you about your concerns, talk
13 with him. If he says I don't feel like I can talk to you,
14 then you file your own separate designation of the record,
15 and if I agree with you that he is out of bounds -- I mean
16 this is one of those things that ought not be that hard.
17 It just shouldn't be that hard. There is stuff that is
18 properly in the court below which can be in a record on
19 appeal. If it's not properly in the record on appeal
20 because it wasn't something presented in the court below, it
21 shouldn't be in the designation or attempted designation of
22 the records. It's pretty much that simple, I think. So if
23 he is not either willing to or able to cooperate, you let me
24 know what your position is, and if it's as straightforward
25 as it sounds like it may be, we'll make sure that the right

1 kind of relief gets accorded to whoever is aggrieved by an
2 improper designation.

3 MR. SUSSMAN: Thank you, judge.

4 THE COURT: Okay. Does anybody else have any
5 questions about what we covered on this call?

6 Hearing nothing, I'll thank you for your time.
7 I'll look forward to getting that form of order setting the
8 dates and times back and we'll conclude today. Thanks.
9 Good-bye.

10 (The attorneys respond, "Thank you, Your
11 Honor.")

12 (Telephone conference ends at 3:52 p.m.)
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